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CRIMINAL LAW ISSUE

GUYTON v. STATE, No. 49S00-0002-CR-105, ___ N.E.2d ___ (Ind. July 25, 2002).
SHEPARD, C. J.

Guyton claims that his convictions for murder and carrying a handgun without a license violate the Double Jeopardy provisions of the Indiana Constitution, citing Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

We held in Richardson that the Double Jeopardy clause is violated if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. at 53. As we recently explained, "[U]nder the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Spivey v. State, 76l N.E.2d 831, 833 (Ind. 2002).

In addition to the instances covered by Richardson, "we have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Pierce v. State, 76l N.E.2d 826, 830 (Ind. 2002) (citing Richardson, 7l7 N.E.2d at 55 (Sullivan, J., concurring), 57 (Boehm, J., concurring in result)).

. . . .

The list of five categories from Justice Sullivan's concurrence in Richardson includes one category presumably covered by constitutional Double Jeopardy (an analysis we recently reaffirmed in Spivey, 761 N.E.2d at 833), described by Justice Sullivan then as "[c]onviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished." Richardson, 7l7 N.E.2d at 56 (Sullivan, J., concurring).

That list also includes:

--"Conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished." Id. (giving the example of a battery conviction vacated because the information showed that the identical touching was the basis of a second battery conviction)

--"Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished." Id. (giving the example of a confinement conviction vacated because it was coextensive with the behavior necessary to establish an element of a robbery conviction).

--"Conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for

which the defendant has been convicted and punished." Id. at 56-57 (giving the example of a conspiracy in which the overt act is no more than the crime itself).

As for Guyton's claim, it does not succeed under any of the above. As we said recently, "Carrying the gun along the street was one crime and using it was another." Mickens v. State, 742 N.E.2d 927, 931 (Ind. 2001).

. . . .

SULLIVAN and RUCKER, JJ., concurred.

DICKSON, J., filed a separate written opinion in which he concurred in the result, as follows:

In Part II, the Court acknowledges that Guyton contends that his convictions of murder and carrying a handgun without a license violate the Double Jeopardy Clause of the Indiana Constitution, as implemented in our actual evidence test in Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). The Court does not address this constitutional claim but instead discusses only the related issue of whether his convictions violate the rules of statutory construction and common law that we recognize to provide a basis for relief separate from and additional to the state constitutional claim. *See* Henderson v. State, 769 N.E.2d 172, 178 (Ind. 2002); Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002); Spivey v. State, 761 N.E.2d 831, 834 (Ind. 2002).

The unaddressed constitutional claim, however, is not meritorious. To prevail in his asserted violation of the Indiana Double Jeopardy Clause under Richardson, Guyton must demonstrate that there is a "reasonable, not speculative or remote," possibility that the jury used the same evidentiary facts to establish all the essential elements of both murder and carrying a handgun without a license. Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999), cert. denied, 530 U.S. 127, 120 S.Ct. 2697, 147 L.Ed.2d 968 (2000).

To prove the murder, the State demonstrated that Guyton caused Larrimore's death by shooting him twice with a handgun. It also showed that Guyton carried the gun both when he met with Sherry Akers before the shooting and then later when he used it to shoot Larrimore. In this case there was direct evidence, apart from Guyton's firing the weapon, that he carried a handgun without a license. Guyton testified that before he arrived at the murder scene he had stopped to talk with Akers and had a handgun wrapped in a towel underneath his leg. He also admitted that he did not have a permit to carry it. Record at 451.

It is not reasonably possible that the jury ignored this evidence and instead based its finding of guilt for the handgun offense solely on the defendant's possession of the weapon at the time he fired it at Larrimore. For this reason, Guyton has failed to establish his claimed violation of the Indiana Double Jeopardy Clause.

In his separate concurring opinion, Justice Boehm proposes a methodology that modifies the Richardson actual evidence test by requiring the evidence proving each offense at trial to be analyzed to determine each constituent "evidentiary fact" or "fact" established by or inferred from the evidence. Thus in this case, Justice Boehm takes the body of evidence showing that Guyton fired a handgun from his car to fatally shoot Larrimore, subdivides it into multiple component "facts," and then concludes that there was no reasonable possibility that the jury based both convictions on the same group of "facts."

It is certainly true that throughout Richardson, we used the phrase "evidentiary facts" instead of "evidence." We used "evidentiary facts" when first articulating the test, id. at 53, when we applied the test to the facts of the case, id. at 54, and when evaluating the proper remedy, id. at 55. [Citation omitted.] However, there is nothing in Richardson or the analysis on which it is based to support the parsing of one evidentiary fact to create multiple evidentiary facts.

Justice Boehm's proposed analysis, I believe, significantly lessens the protection provided by the Indiana Double Jeopardy Clause. If this methodology had been followed in several of our earlier post-Richardson opinions that found double jeopardy violations, we would have reached an opposite result.

For example, in Turnley v. State, 725 N.E.2d 87 (Ind. 2000), the defendant and an accomplice broke into a home to steal money and agreed to kill the female occupant if necessary. While Turnley held her hands, his accomplice choked her to death. Turnley was convicted of multiple crimes including both murder and conspiracy to commit murder. The conspiracy count alleged that Turnley's restraint of the victim was the overt act element of conspiracy. Under Justice Boehm's proposed methodology, a reviewing court would break the evidence into component "evidentiary facts" including: (1) Turnley and his accomplice agreed to kill the victim; (2) they intended to kill; (3) Turnley assisted by restraining the victim; (4) the accomplice strangled her; and (5) the victim died from the strangulation. Using the proposed analysis the court would then determine that the jury used "evidentiary facts" (1), (2) and (3) to establish the essential elements of the conspiracy count, and that the jury used "evidentiary facts" (2), (4), (5) and possibly (3) to establish the murder. The result would be that there is no double jeopardy because there is no reasonable possibility that the jury relied upon the same body of "evidentiary facts" to establish both offenses, i.e., no possibility that all the "evidentiary facts" establishing one offense are included among those that establish another offense, or stated differently, no possibility that the "evidentiary" facts used by the jury to establish all the elements of one offense were also used to establish all the elements of another offense.

Our opinion, however, reached the opposite result. Finding a violation of the Indiana Double Jeopardy clause, we held that "there is at least a reasonable possibility--indeed a high probability--that the jury used the same evidentiary fact--the restraining and strangulation of [the victim]--to prove an essential element of the conspiracy to commit murder (the overt act) and also the essential element of murder. Turnley, 725 N.E.2d at 91.

. . . .

I acknowledge that, in many cases where a defendant is convicted of both an offense committed with a handgun and the offense of carrying a handgun without a license, the Richardson actual evidence test may, at first blush, appear to require that the handgun offense be vacated. The same evidence proving an offense involving use of a handgun would also appear to prove the elements of carrying a handgun without a license--if we presume that, because the existence of a license is a matter of affirmative defense for the defendant, it is not considered as an element of the offense. *See* Ind.Code § 35-47-2-24; Washington v. State, 517 N.E.2d 77, 79 (Ind. 1987). I contend, however, that this presumption is inappropriate.

To determine if a defendant has been punished twice for the same offense under the Richardson actual evidence test, a better approach is to consider all three statutory elements of the offense of carrying a handgun without a license: (a) carrying a handgun in any vehicle or on or about his person (b) except in his dwelling, his property, or fixed place of business, (3) without a proper license in his possession. Ind.Code § 35-47-2-1. [Footnote omitted.] This is not necessarily inconsistent with Washington because it was addressing whether the existence of a license is an element that must be disproved by the State or a matter that constitutes an affirmative defense to be proved by a defendant. 517 N.E.2d at 79. It was in this context, not that of double jeopardy, that we declared in Washington: "Proof that a defendant does not possess a license to carry a handgun is not an element of . . . the statute which delineates this crime." Id. at 79.

In contrast to this language in Washington, our Court of Appeals recently found no violation of the Indiana Double Jeopardy Clause under the Richardson actual evidence test by assessing the "essential elements" of the offense of carrying a handgun without a license to include both the elements which the State must prove and that which the defense must prove. Ho v. State, 725 N.E.2d 988 (Ind. Ct. App. 2000). In essence, the Ho court held that there was no violation of the Indiana Double Jeopardy Clause because the evidence used by the jury to establish robbery while armed with a handgun did not also relate to whether or not Ho possessed a valid license. *See* id. at 993. In applying the

actual evidence test for violation of the Indiana Double Jeopardy Clause, the Ho court used the term "element" in a different sense than it was used in Washington, where we used the phrase "not an element" merely to succinctly express the idea that such proof is not an element on which the State carries the burden of proof. We recently expressed approval of Ho in Mickens v. State, 742 N.E.2d 927, 931 (Ind. 2001), which also rejected a double jeopardy claim arising from convictions for murder and carrying a handgun without a license.

In the present case, even if we did not consider the separate evidence of Guyton's unlicensed possession of the handgun before he arrived at the murder scene, Guyton's convictions for murder and carrying a handgun without a license would not violate the Indiana Double Jeopardy Clause. There would be no reasonable possibility that the evidentiary facts used by the jury to establish the elements of murder were also used to establish the essential elements of carrying a handgun without a license. The evidence proving the murder did not involve the existence or absence of a license for the handgun, and the facts proving carrying an unlicensed handgun did not include the resulting death of the victim.

BOEHM, J., filed a separate written opinion in which he concurred, in part, as follows:

The Court today affirms Guyton's convictions for murder and possession of a handgun based on our holding in Mickens v. State, 742 N.E.2d 927 (Ind. 2001), that possessing the gun is one crime and killing with it is another. I agree, but I believe we need to explain how this ruling relates to the double jeopardy doctrine announced in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), which the Court cites, then does not mention again. I also believe we should directly address Guyton's claim that Richardson precludes use of the same evidence—Butts' testimony—to convict him of both crimes.

In Richardson, a three Justice majority announced an "actual evidence" test for double jeopardy under the Indiana Constitution as applied to multiple convictions in the same trial. Richardson formulated the test for Indiana constitutional double jeopardy as whether there is a "reasonable possibility" that the "evidentiary facts" supporting one conviction were used by the jury to support another. In substance, applying this Richardson test means opting for (1) psychoanalyzing the jury based on evidence, argument, instructions and charging instruments and indulging in the irrebuttable presumption the jury followed all of these; (2) the "reasonable possibility" standard to determine whether that occurred, and (3) the requirement that "all" not just one of the "evidentiary facts" overlap.

After citing Richardson, the Court today reaffirms several "rules" that preclude imposition of multiple punishments under some circumstances. As formulated by Justice Sullivan's concurring opinion in Richardson, these turn in large part on whether the "very same act" supports two convictions. The problem Richardson sought to address, albeit with a slim majority, was how we know when we have two crimes supported by the "very same act." I think we owe an explanation of this mystery because I believe today we have in effect abandoned Richardson, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims.

Guyton's claim under a Richardson analysis is a claim that the evidentiary facts supporting his handgun conviction are included in those supporting his murder conviction. The Court makes no mention of what the jury might have found, and there is no reference to the "reasonable probability" standard. Rather, we are told, and I agree, that carrying the handgun is one thing and firing it is another. For the reasons that follow, I believe this represents an abandonment of Richardson and a return to the pre-Richardson methodology of reviewing the evidence, instructions, charging instrument and argument of counsel under a de novo standard to determine whether it is more probable than not that the facts supporting one conviction are embraced within those supporting another. On this basis, I concur in the Court's opinion.

. . . .

Richardson sought to establish "a single comprehensive rule [of double jeopardy] synthesizing and superseding previous formulations and exceptions." Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002). Subsequent experience has made clear that this goal was not achievable, at least not without upsetting a number of the precedents supporting the rules cited by Justice Sullivan. For example, the requirement of Richardson that all facts of one crime be embraced within that of the other limits its application to the rules prohibiting conviction for lesser included offenses. In recognition of the incompatibility of the actual evidence test with these precedents, Pierce v. State, 761 N.E.2d 826 (Ind. 2002), acknowledged that some of these doctrines were not of constitutional dimensions and were not governed by Richardson. Accordingly some of these rules (e.g., the same bodily injury does not elevate two crimes) are not subject to a Richardson analysis, and can prohibit double enhancement through a single common element. At the same time, in Spivey, we reiterated that the Richardson constitutional test required all, not just one, of the "evidentiary facts" of one crime to be embraced within those of another before the constitutional test of Richardson would bar two convictions. Spivey, 761 N.E.2d at 833.

I concur in everything the Court says. I nevertheless believe the widespread confusion reflected in the Court of Appeals cases attempting to apply Richardson requires us to try to explain how future cases are to be analyzed. [Footnote omitted.] The first Sullivan rule is the statutory elements test, identical to federal double jeopardy under Blockburger v. United States, 284 U.S. 299 (1932). The second and third prohibit dual convictions under an analysis substantially the same as identification of a "factually" lesser included offense, as that term is explained in Wright v. State, 658 N.E.2d 563 (Ind. 1995). [Footnote omitted.] Both Richardson and Wright teach that we look to the charging instruments and evidence to determine whether one crime is a "factually" lesser included offense. Richardson and several of its progeny make clear that the charging instrument, [footnote omitted] the instructions, [footnote omitted] arguments of counsel, [footnote omitted] and the evidence itself [footnote omitted] may be relevant to a determination whether the "evidentiary facts" of one crime are included among those of another.

The fourth Sullivan rule requires us to determine whether "the very same behavior or harm" enhanced two crimes, but we are not told how that is to be determined or reviewed on appeal. The fifth similarly turns on whether the overt act supporting a conspiracy is "the very same act" as another crime. All of the foregoing is acceptable to me, but I think we should be clear what we are doing and what we expect the Court of Appeals to do in reviewing these claims. . . .

. . . Although the "actual evidence" test has acquired that sobriquet, in my view it could also have been accurately described as a "same facts" test. Richardson described it as "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." [Citation omitted.] Thus, to prevail under that test, Richardson taught that Guyton must demonstrate a "reasonable possibility" that the same "evidentiary facts" used by the jury to establish the essential elements of the murder charge were also used to establish the essential elements of the handgun offense. And, as we recently noted in Spivey v. State, 761 N.E.2d 831 (Ind. 2002), the "use" of facts establishing one crime to establish a second means all, not just some, of the evidentiary facts establishing one are included among the evidentiary facts establishing the other.

By "evidentiary fact," I take Richardson to mean the events found to have occurred, without regard to their legal consequences and independent of the terms lawyers and judges may use to describe them or the legal results these facts produce. Some might prefer the simple term "fact," or "historical fact" or "event or circumstance." The Court today uses "the very same act." By that term, I think the Court also means the same thing as "same fact" in its embrace of the Sullivan rules. But using the term "same act" is problematic because it limits review of the facts to what the defendant did. Some elements

of crimes are the consequences or circumstances of the crimes. Thus the same "act"—e.g., burning down a building—can result in conviction of two murders if there are two victims. Cf. Burnett v. State, 736 N.E.2d 259, 263 n.3 (no double jeopardy where there are multiple victims). For this reason I believe it is more useful to use "fact" rather than "act" to describe the overlap that precludes conviction for two crimes.

Finally, Richardson refers to "essential elements." Because proof of all elements of a crime is essential to conviction, I use "elements" interchangeably with "essential elements." I understand that Richardson's majority intended the latter term to include not only statutory elements, but also the elements as charged. Thus, although the statutory elements of a felony murder are killing in the course of a felony, if the charging instrument alleges killing in the course of a robbery on June 13, 1999, these then are among the "essential elements" as charged. It is in this sense that I use the term "elements" to mean what needs to be proven to satisfy the statute and the charging instrument.

. . . Justice Sullivan's rules, as he formulated them and as the Court states and applies them today, do not turn on a Richardson analysis. Each of them requires a determination whether "the very same act" or the "very same behavior or harm" is involved in two crimes, but none elaborates how that determination is to be made. When the Court tells us that none of the five Sullivan rules is breached by Guyton's convictions, it impliedly holds that (1) the handgun and murder convictions were not based on the very same act and (2) no element of either crime consisted of the very same act that constituted the other. The Court's formulation gives us a result: carrying the gun and firing it are two different things. I agree, but this explanation does not address any of the following issues:

1) Is this a ruling on a point of law or a finding of fact?

2) Guyton's claim is that the same evidence established both the carrying and the firing of the gun, and this violates Richardson. Is the evidence in Guyton's case relevant to this finding by this Court? If not, how does Richardson relate to this case? If Richardson is applicable, how do we determine whether there is a "reasonable possibility" that the jury used the same facts to find Guyton guilty of the possession and murder charges?

3) If the trial court made a finding on this point, what standard of review applies?

4) Is this determination that these do not overlap to be measured by the "reasonable possibility" of overlaps, or a preponderance of the evidence, or something else?

. . . I believe one critical point for purposes of analyzing factually "lesser included" crimes under Richardson or otherwise (Justice Sullivan's second and third rules) is that the law prohibits sentencing for two convictions if the *facts* supporting one conviction are embraced within the facts supporting the other. But it does not preclude two convictions if each is based on a fact that is not required for the other. Guyton contends that the jury used the same fact—his carrying a firearm that he discharged at Larrimore—to convict him of both murder and carrying a handgun without a license. This confuses facts with evidence. [Footnote omitted.] Guyton correctly points out that the evidence supporting the facts was the same, but I agree with the Court that the facts supported by the evidence—possessing a gun and firing it—are distinct.

In evaluating a claim of double jeopardy, we must distinguish not only between evidence and facts. We must also differentiate the elements and legal conclusions involved in the two crimes. Butts testified that Guyton fired a handgun at the group and, in the process, shot Larrimore. His testimony was *evidence*. [Citation omitted.] *Facts* are the historical facts, acts, events or circumstances that a finder of fact, after considering the evidence, concludes occurred. They may include facts directly related by the evidence, and also reasonable inferences as to what happened that are drawn from the evidence. In order to support a conviction, the facts must in the aggregate establish the *elements* of a crime. The elements are the legal terms we use to describe a fact or an aggregation of facts. If each element is found, the finder of fact reaches the *legal conclusion*, or verdict, that a crime has been committed.

Although sometimes we use the same word to describe both a "fact" and an "element," elements are not the same as facts. Rather, elements are words of legal significance. Thus, a lay person might well describe an event by saying the defendant "forced the door open." But another witness might say the defendant "broke and entered." Both have described a fact that supports an element of burglary, whether or not they used the legal label that is pinned on the element. To further confuse us, some elements and some crimes are described by the same terms we use for the fact. Thus a witness in a rape case might well respond to the question "What happened next?" with "He raped me." But few would respond "He confined me" or "She battered me" to describe those crimes.

In short, despite our occasional or even frequent use of the same word to describe a fact, or an element, or the crime itself, the three are distinct from each other and from the evidence in the case. This is true for purposes of Richardson's double jeopardy analysis, and also for purposes of determining the "very same act" under the rules cited by the Court. Only the "facts" are critical for double jeopardy purposes. I use that term to include the Court's term ("act") and also consequences ("multiple victims," "bodily harm") and circumstances ("absence of a license").

. . . In my view Guyton's argument arguably prevails under Richardson. The facts critical to the murder charge in this case are: (1) Guyton pointed a gun at Larrimore and shot him; (2) Larrimore died as a result; and (3) Guyton had the requisite mens rea because he either (a) intended to kill Larrimore, or (b) intended to kill someone else in the group under the doctrine of transferred intent, or (c) fired the shot with knowledge of a high probability that the shot would be fatal. The facts relevant to the elements of the handgun charge are (1) Guyton possessed the gun and (2) he did so on a public street. The piece of evidence that Guyton shot Larrimore from the car speaks directly to the fact of the defendant's action (firing the shot), and it also supports the inference of a second fact relevant to the murder charge, namely intent to kill. [Citation omitted.] Thus, both shooting and the intent to kill are facts directly or inferentially drawn from Butts' testimony that Guyton fired a handgun at the group, and hit Larrimore.

The jury obviously could have inferred the presence and possession of the gun in a public street for some span of time including the instant of its use. If so, Richardson would not bar both convictions. But under these circumstances it is not obvious that the jury did draw that inference. That leaves us with a reasonable possibility that the jury "used" the fact of shooting to support the handgun charge. Yet to force the conclusion that Richardson permits both convictions we must say there is no reasonable possibility that the same fact—Guyton shot Larrimore—was "used" by the jury. I think it is more appropriate and certainly easier to follow if we admit that we are holding as a matter of law that the evidence supports both convictions. Thus, Butts' testimony, although one item of evidence might or might not have produced distinct evidentiary facts found by the jury: (1) Guyton shot Larrimore; (2) Guyton had the requisite mens rea; and (3) Guyton possessed a handgun on a public street.[9]

. . . I agree with the Court that none of Justice Sullivan's rules is breached by Guyton's two convictions. But I think that it takes some explanation as to why that is true, and what methodology is required to reach that conclusion. Guyton was convicted of murder and

[9] I do not think it useful or possible to attempt to reconcile all past cases with this or any other theory. I would say, however, that I think Justice Dickson's view of what we are in substance doing slices matters too thinly. I view the Turnley case as an example of Sullivan Rule 5: the overt act supporting the conspiracy cannot be the "very same act" as the crime that is the object of the conspiracy. Turnley's restraint of the victim was the "act" by which he participated in the murder. Similarly, Richardson was governed by Sullivan Rule 3 because his "act" of battery constituted an element of the robbery as a C felony by reason of his use of force. Richardson, 717 N.E.2d at 55 (Sullivan, J., concurring).

possession of a handgun without a license. The elements of murder are (1) intentional or knowing (2) killing of (3) a human being. The elements of carrying a handgun without a license are: (1) carrying a handgun in any vehicle or about the person (2) except in one's dwelling, on one's property or fixed place of business. [Footnote omitted.] Clearly we have no statutory elements problem here. And it is obvious that the fourth (double enhancement) and fifth (conspiracy) of Justice Sullivan's rules do not apply to this situation.

The remaining issue is whether the same facts support both convictions. It seems to me that the Court today handles this the way pre-Richardson appellate courts typically did by determining, under a de novo review of whatever is relevant, whether the facts of one crime are such that the "same fact" fits one of the Sullivan rules. Thus, just as under Richardson, we look to see if, under the statutes, charging instruments, evidence and arguments of counsel, it seems to us that the facts establishing one crime are the same as the facts establishing another (Rule 2) or establishing one or more elements of another (Rule 3). But we do this de novo, and without any effort to analyze what the jury might have considered. Whatever the jury's reasoning was, we find as a matter of law that the evidence did or did not support both convictions.

. . . In sum, although the *evidence* supporting the facts necessary for the handgun conviction was included in the evidence necessary for the murder conviction, the issue, in my view, is whether the *facts* supporting these two crimes are distinct. It seems to me we cannot say that there is no reasonable possibility the jury based both of Guyton's convictions on the same set of facts. But it is easy to say that the gun did not appear magically in Guyton's hand at the instant of firing. Therefore, viewed de novo there was evidence supporting the facts essential to the murder conviction and also the fact that Guyton possessed a handgun whether or not he fired it. If so, the facts supporting the murder do not embrace all the facts supporting the handgun offense. Therefore, Guyton's convictions for murder and carrying a handgun without a license do not violate the Indiana Double Jeopardy Clause.

CIVIL LAW ISSUES

ESTATE OF DELLINGER v. 1st SOURCE BANK, No. 71A05-0111-CV-506, ___ N.E.2d ___ (Ind. Ct. App. July 30, 2002).

ROBB, J.

Conrad first argues the will was not properly executed because the witnesses signed the will only once in a self-proving clause at the end of the will. Conrad argues the witnesses must sign twice for a valid, self-proving will: first, in an attestation clause pursuant to Indiana Code section 29-1-5-3(a)(2), and second, for the self-proving clause pursuant to section 29-1-5-3(b). . . .

In response, Dellinger's estate argues that under 29-1-5-3(d), only one set of signatures to a will is necessary, and the witness signatures in the self-proving clause of Dellinger's will satisfied that requirement. . . . [U]nder the estate's interpretation, a person making a will has the option to have the witnesses sign twice under subsections (a) and (b) or to have witnesses sign only once under subsection (d). "The actual contents of the clauses provided for under I.C. §29-1-5-3(b) and I.C. §29-1-5-3(d) are very similar, indicating that the legislature must have intended to allow for an alternative to the self-proof steps in subsection (b) when it enacted subsection (d). Any other reading would render subsection (d) redundant." [Citation to Brief omitted.] We agree with the estate that subsections (b) and (d) are sufficiently similar as to be ambiguous; thus, we are left to determine the intent of the legislature in enacting these two similar provisions.

. . . .

In looking at even earlier history of the statute, we find that the 1975 revisions to the statute were the first to create a mechanism by which a will could be made self-proved; no such provision existed in previous versions of the statute. [Citation omitted.] Current subsection (d) provides in pertinent part that "[t]his subsection applies to all wills, regardless of the date a will was executed. A will is presumed to be self-proved if the will includes an attestation clause signed by the witnesses that indicates [the six statutory factors]." (Emphasis supplied.) Because we must attempt to give effect to every word in the statute, we hold the emphasized phrase to be a "grandfathering" clause allowing a self-proving clause to be added to wills executed even earlier than the 1975 statutory revision. Thus, subsection (b) is distinguishable from subsection (d). Furthermore, because the statute includes the emphasized phrase regarding the date of execution, we presume the legislature intended the subsection to apply to wills previously executed, necessarily implying wills previously attested. Therefore, neither subsection allows for only one set of signatures on a will, and the will is also not validly executed under subsection (d) of the statute. Because the witnesses only signed the will once in a self-proving clause and did not separately attest as required by Indiana Code section 29-1-5-3, Dellinger's will was not validly executed.

. . . .

BAILEY and NAJAM, JJ., concurred.

ESTATE OF FOLENO v. FOLENO, No. 76A05-0111-CV-496, ___ N.E.2d ___ (Ind. Ct. App. July 30, 2002).

BAKER, J.

Today we are asked to impose a constructive trust on proceeds of a life insurance policy in favor of the heirs of a woman killed by her husband, in clear contravention of the terms of the insurance contract. The trial court ruled that the terms of the insurance contract should prevail and so awarded the proceeds to the policy's contingent beneficiaries. We affirm. [Footnote omitted.]

. . . .

As contingent beneficiaries, the Foleno brothers are entitled to the insurance proceeds. First, applying broad equitable principles to rewrite the insurance contract in this case does not advance the purpose for the principles: to prevent a killer or his heirs from profiting through a victim's property. Second, as the insured and owner of the policy, Billy had a vested interest in choosing the beneficiaries in the event of his death. Imposing a constructive trust on the proceeds would be a deprivation of this property interest and would run counter to our supreme court's general rule laid down in Bledsoe, that a killer does not forfeit his own property interests. Third, imposing the Slayer's Rule in these circumstances would introduce confusion, arbitrariness, and uncertainty into well-established property transfer laws. For these reasons, the trial court correctly applied the law to the facts, and we affirm its summary judgment in favor of the Foleno brothers.

[Footnote omitted.]

. . . .

DARDEN, J.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows:

Billy Foleno's heinous murder of his wife eliminated her not only as the primary beneficiary of the life insurance policy but as well from the face of the earth. Were it not for this criminal act, the Foleno brothers would not have any claim to the insurance proceeds. The criminal act therefore benefited the brothers.

. . . .

Notwithstanding the powerful force of the majority's historical analysis and solid reasoning, principles of equity compel my view that we should apply this court's decision in Heinzman v. Mason, 694 N.E.2d 1164 (Ind. Ct. App. 1998). There we held that a constructive trust should be

employed to prevent not only the wrongdoer from benefiting but to prevent the wrongdoer's heirs from benefiting even where the heirs are completely without fault.

I would reverse and remand with instructions to grant summary judgment in favor of the Estate of Charlotte Foleno.

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